Supreme Court, U. S.
FILED
AUG 7 1978
MICHAEL RODAK, JR., CLERK

78-214

IN THE SUPREME COURT OF THE UNITED STATES

JANICE DUNCAN, et.al.,
PETITIONERS

VS

OHIO CAUSE NUMBER 78-390

BRONDES FORD SALES, INC., et.al.,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

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TABLE OF CONTENTS

	Page
METHOD OF DISPOSITION IN STATE COURT.....	1
JURISDICTION OF THIS COURT.....	1-3
QUESTIONS PRESENTED.....	3-4
CONSTITUTIONAL & STATUTORY MANDATES.....	4-5
STATEMENT OF THE CASE.....	5-6
REASONS WHY WRIT SHOULD ISSUE.....	6-15
CONCLUSION.....	16
CERTIFICATE OF SERVICE.....	16

TABLE OF CASES

Blair vs. Kirby Co.....	8
Buchanan vs. Warley.....	8
Chapman vs. Meir.....	15
Detlef vs. Dr. Meyers.....	7
Elliott vs. Brondes.....	7
Fidelity Insurance Co. vs. Fic.....	7
Gibson vs. Berryhill.....	10
Gorajewski vs. Village of Swanton.....	7
Gumey vs. Cowan.....	8
Harold R. Mitchell vs. United States.....	12
In re: Murchison.....	10
Kamas vs. Cleveland Retail Men's Co.....	8
Miller vs. Pate.....	12
Moore vs. Wallace.....	7
Peckham vs United States.....	10
Riley vs Riley.....	7
Skinner vs Pennsylvania Rd.Co.....	8
Withrow vs. Larkin.....	10

STATUTES

United States Constitution,Amendment Fourteen.	4
Ohio Revised Code,Section 4511.21.....	4
Rule 32(A)(1) Ohio Rules of Civil Procedure	11

APPENDIX

NOTICE OF APPEAL & PRAECIPE FOR TRANSCRIPT(Comm.Pl. Ct.).....	I-III
CERTIFICATE of SERVICE.....	IV
ASSIGNMENTS of ERROR(Ct.of App).....	V
Journal Entry(Ct. of App).....	VI-XIV
NOTICE OF APPEAL(Ct.of App.).....	XV-XVI
PROPOSITIONS OF LAW.....	XVIII
MOTION TO CERTIFY RECORD.....	XIX
JUDGMENT OF OHIO SUPREME COURT.....	XX-XXI
PERTINENT EXCERPS FROM TRANSCRIPT OF RECORD....	XXII-XL
OHIO CIVIL RULE.....	L
UNITED STATES CONSTITUTION,AMENDMENT FOURTEEN..	LI
Ohio Revised Code.....	LII-LVI
Cross References to cases construing 4511.21 of Ohio Revised Code.....	LVI

Petitioners pray that a writ of certiorari will issue to the Supreme Court of Ohio directing it to certify the record of the within cause upwards to this Court in order that it might review the same.

Petitioners say that the proceedings held and concluded in the Ohio courts deprive them of due process and of equal protection of the law. they advanced their claimed Constitutional violations by way of "Assignments of Error" in the intermediate court of appeals of Ohio;they raised the question in the form of "Propositions of Law" in the Ohio Supreme Court.

METHOD OF DISPOSITION IN STATE COURT

Motion to certify the record of the pending cause was filed in the Supreme Court of Ohio on March 27,1978.

On May 11,1978, that Court overruled petitioners' motion,without opinion,and on its own motion,it dismissed their appeal on the sole ground "... that no substantial constitutional question exists herein."

JURISDICTIONAL BASIS OF THIS COURT

Petitioners come here for review of a judgment which is in accord with the long standing practice of the courts of Ohio;a practice which arbitrarily discriminates against them solely because they are white citizens who elected to employ the services of non-white counsel to represent them in their attempts to obtain redress for civil wrongs committed against them. The practice,they contend,abridges the privileges and immunities of the black lawyer,and it deprives black lawyers,as a group,of equal protection of the law in that it severely limits their ability to derive a livlihood out of the conduct of their chosen profession.

The jurisdiction of this Court,therefore, is invoked pursuant to 28 U.S.C. Section 1257(3) as petitioners contended in the highest court of Ohio,and as they claim here that they were deprived of substantive and procedual due process,and of equal protection of the law,a "...right,privilege or immunity...claimed under the Constitution,treaties,or statutes..."

Judgment in the case Sub Judice was entered on verdict of the jury in the trial court on March 31, 1977;appeal was prosecuted therefrom to the intermediate court of appeals within the time provided therefor by

law,and a timely motion to certify the record upwards to the Supreme Court of Ohio for review of the affirmance of the trial court judgment by the intermediate court of appeals was filed in the Supreme Court. On May 11,1978,the Supreme Court of Ohio overruled and the appeal was dismissed.

QUESTIONS PRESENTED

The specific questions raised by the petitioners herein are as follows:

(a) Whether a state may propagate its policy of economic sanctions against blacks in its courts through depriving white citizens of the right to counsel of their own choosing in a civil case.

(b) Whether the use of obstructionists tactics by adversary counsel during the course of the trial of a case coupled with his disregard for specific rules of procedure,joined by comments by the trial judge,whether the totality of this behavior deprive the plaintiff of due process and equal protection of the law where they hold the plaintiff out to the jury as being something less than an honest suitor when giving testimony bearing on the extent and magnitude of her injuries, where,as here,she is deprived of the right to recover.

(c) Whether where the verdict of the jury and the judgment of the court entered pursuant thereto are contra to the preponderance of the evidence adduced during

the course of the trial of the case,whether that verdict and judgment deprives the plaintiff of due process and equal protection of the law.

(d) Whether where a state secures the right to recover for civil wrongs committed against certain citizens,but precludes such recovery for other citizens similarly situated,whether the latter are denied equal protection of the law.

(e) Whether the Supreme Court of Ohio erred in its determination that petitioners' appeal from the intermediate court of appeal to that Court was devoid of a substantial constitutional question.

CONSTITUTIONAL PROVISIONS AND STATUTORY MANDATES

The rights which Ohio courts customarily violate of white litigants in the circumstances of petitioners are rights secured to them by Section Two of the Fourteenth Amendment to the United States Constitution ; the pertinent provision being couched in the language which follows:

> " All persons born or naturalized in the United States,and subject to the jurisdiction thereof,are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;nor shall any State deprive any person of life,liberty, or property without due process of law;nor deny to any person within its jurisdiction the equal protection of the laws."

The arbitrary application of Section 4511.21 of the Ohio Revised Code by the courts of Ohio comes

the Ohio Revised Code are apparent here,and the construction placed on Rule 32(A)(1) of the Ohio Rules of Civil Procedure by the intermediate court of appeals seems to fall a little short of comporting with the ordinary usage of the English Language.

STATEMENT OF THE CASE

At issue here is the constitutionality of the practice of Ohio courts in depriving white citizens of redress when represented by lawyers of color,thereby denying them the right to counsel of their own choosing in a civil case,and the application of that principle to the petitioners.

Petitioner Janice Duncan was the victim of a rear-end automobile collision during the month of August, 1974. The nature of the injuries sustained by her were to the neck,back,and chest area,and,as such,necessitated medical care and treatment by her physician. The extent of her injuries rendered performance of her old job impossible, and at the date of the trial of this cause she had sustained a wage loss in the neighborhood of Twenty-Eight Thousand($28,000.00)Dollars.

Joined by her spouse,Browdys Duncan,they instituted action in the common pleas court of Lucas County, Ohio in an attempt to recover loss wages together with damages for pain and suffering for Janice while Browdys sought restitution for expenditures for medical care and attention rendered to his wife plus compensation for the loss of her services.

The case was called for trial by jury on March 30, 1977,and inspite of the fact that no positive evidence was introduced by petitioners' adversaries tending to refute the magnitude of their claims for loss wages,for pain and suffering,medical care and treatment,loss of consortium,or the nature and extent of the temporary injuries sustained by Janice Duncan,the jury still returned a verdict in favor of the defendants and against the plaintiffs.

Having failed in the courts of Ohio on their claims of violation of the rights to a fair and impartial trial and denial of equal protection,they seek review here on those grounds.

THE WRIT SHOULD ISSUE

The State of Ohio,through its judicial department

customarily frustrates the right of whites to a fair and impartial trial and to extend to them equal protection of the law in those civil cases where they retain nonwhite counsel to aid them in this connection, and where both the adversary and his counsel are white.

When review of the practice is sought in the appellate courts of the state the practice is perpetuated through summary disposition of the appeal without opinion by finding the claimed error or violation not "well taken," or, as here, by simply overruling the motion to certify the record.

Fidelity Insurance Co. vs. Fic (Tol.Muni.Ct.), 291-029; Moore vs. Wallace (Tol.Muni.Ct.), 76-14935; Gorajewski vs. Village of Swanton, F77-4; Riley vs. Riley (Comm.Pl.Ct.), 77-1217; Elliott vs. Brondes (Comm.Pl.Ct.) 77-0264; and Detlef vs. Dr. Meyers (Comm.Pl.Ct.) 77-0319, are all cases where white persons were represented by nonwhite counsel, and in each of them the law was arbitrarily applied by the courts so as to defeat the right of the litigant to a fair and impartial trial. Constitutional rights of the lawyer are violated in these cases also through painting a portrait of losing lawyer on counsel of color. Soon, nobody will hire the lawyer whom the courts hold

out to be a perpetual loser.

In those cases where the litigant and his lawyer have been Anglo-American, the courts of Ohio have not been remiss in their obligation to ascertain that the rights secured to the litigant by federal and state law were protected. Skinner vs. Pennsylvania Rd. Co., 127 Ohio St. 69, 186 N.E. 722 (1933); Gumey vs. Cowan, 129 Ohio St. 36 (1934); Karmas vs. Cleveland Retail Men's Co. 131 Ohio St. 471, 3 N.E.2d. 427 (1936); Blair vs. Kirby Co., 49 Ohio St. 2d. 5, 358 N.E.2d. 634 (1976). See also pp. LII-LVI of the Appendix appended hereto.

That a state may not use its policy of oppression of one group of citizens as a vehicle by which to deprive white citizens of rights protected by the United States Constitution in the lesson which we learn from the study of the teachings of Buchanan vs Warely, 245 U.S. 60, 38 S.Ct. 16.

II

The trial of the case at bar began with defense counsel interposing objection to the order chosen for the presentation of witnesses for the plaintiffs by their counsel. This objection was sustained by the trial judge. From that moment on the concept of dignity,

order and apparent impartiality during the course of judicial proceedings took leave of its senses.

There were repeated objections interposed by respondents' counsel,most of which were sustained by the trial judge. Then there were wails and outbursts in the nature of "I'm trying to give Mr. Hopkins latitude, but he is running all over me" together with open and notorious attempts to interfere with the cross examination process by indicating to the witness how he should answer questions.(A-XXVII-XXVIII).

Then the trial judge seems to have gotten caught up in the merrimaking to such an extent that at one point in the cross examination process of respondents' medical expert relative to petitioner Janice's inability to bend over and touch her toes,he commented," I don't think I could make it within eight inches."(A-XXX) The comment obviously had the effect of bootstrapping the testimony of the medical expert through downplaying the credibility to be atteched to the testimony of the petitioner by the jury.

The conduct of defense counsel had atleast a confusing impact upon the jury:the repeated sustaining

of almost every objection made by him by the trial judge together with the atmosphere in which the trial was held must have made petitioners' counsel appear less mindful of the rules of evidence and more obsessed with winning the case than with obedience to general principles of law.

The comment by the trial judge following in the wake of respondents' medical expert's claim that Mrs. Duncan stated to him that she never could bend over and touch her toes coupled with defense counsel's pretext that she made prior inconsistent statements during a deposition taking certainly made her seem an untruthful witness. The trial was thus given the flavor of good guys versus bad guys with the judge on the side of the good guys.

It has always been the rule of this Court,ever since In Re:Murchison anyway,that "a fair trial in a fair tribunal is a basic requirement of due process," and that a bias decision-maker cannot be tolerated. In re: Murchison,349 U.S.133(1955).

The doctrine of Withrow vs Larkin,421 U.S.35;Gibson vs Berryhill,411 U.S.564,and Peckham vs UNited States, 210 F.2d.693 tells us that chaos in the courtroom

adversely affect the rights of the parties is no less applicable here as well.

III

During the course of his cross-examination of the petitioners in the trial court, defense counsel, while holding in his hands what purported to be depositions taken of petitioners prior to trial by him, repeatedly inquired if they remembered making certain statements during the taking thereof, and promising, at one point, to indicate the pages where the statements could be found in the depositions, "in a moment," whenever petitioners either denied or had no recollection of making the statements attributed to them.

It developed that he never got around to pointing out the specific pages, and neither had he filed the depositions with the court as required by Rule 32(A)(1) of the Ohio Rules of Civil Procedure. (A-L).

The intermediate court of appeals approached the conduct first by and through magnifying the error of mis-numbering the Rule by petitioners counsel's office staff, (A-VIII) and then it went on to construe Rule 32(A)(1) to admit of the use of depositions when not filed with the court except in those case where adversary

counsel detected the breach by his opponent and interposed a timely objection. (A-IX)

Perjured testimony was introduced and given by the police officer who investigated the auto accident at the scene both with respect to the scope and magnitude of his investigation, what it revealed, and to the measure of damage to the cars involved. He appeared at the trial with a copy of the accident report in his pocket, a report which the Toledo Traffic Division and petitioners' counsel had tried in vain to locate for a period in excess of three weeks prior to the trial date, and he testified that he was scheduled to attend another judicial proceeding within "about twenty minutes" from the time of his taking the witness stand. Subsequent investigation revealed that he neither had, nor did he attend a judicial proceeding after his departure from the witness stand.

That perjured testimony cannot be used as the basis upon which to foot a valid judgment needs no citation of authority for its support. However, attention is called to Harold R. Mitchell vs. United States, 368 U.S. 439, 7 L.Ed 2d. 429 (1962); Miller vs. Pate 386 US 1, 17 L.Ed 2d. 690 (1967), and cases there cited.

The trial court instructed the jury,in part, as follows:

> " The burden of proof is upon the plaintiff to prove the facts necessary for his or her case by a preponderance of the evidence.Preponderance of the evidence in the greater weight of the evidence,that is,evidence that you believe because it outweighs or over balances in your mind the evidence opposed to it."

While a correct statement of the law under ordinary circumstances,the fact here is that the defense introduced absolutely no evidence in opposition to petitioners' evidence supporting their claims of temporary injuries,cost incurred for medical care,and wage loss by petitioner Janice Duncan.

Testimony on the question of "spasms,"the symptom of back injuries,was elicited from respondents' medical expert by the questions and answers to follow:

Question:

> "All right,sir.Now did you also conclude ,doctor,from the conditions of the spinal chord,at that time(two years later)that there had never been any muscular spasm as a result of the curvature of the spine?"

Answer:

> "No. I can't say that there never was any muscular spasm."

Question:

> "So it is medically possible,isn't

> that so,that Mrs. Duncan could have had various degrees of curvature of the spinal chord producing muscular spasm from that period(August,1974)to just before she came in to see you(Feb.,1976),and she could have cleared up by that time,isn't that so?"

Answer:

> "She could have." (A-XXXIII-XXXIV)

The whole defensive thrust mustered and advanced by respondents in the trial court amounted to nothing more than distractions aimed at confusing the jury and at frustrating petitioners in their attempt to present their case in an orderly sequence,disproof of the claim of permanent injury by use of their medical expert witness,and through minimizing the extent of personal injury to Janice Duncan through employment of the testimony of the police officer, which testimony falsified the existence of physical facts present at the scene of the accident.

Depriving the citizen of the right to recover where he has presented and proved his case in accordance with the rule of law is itself a denial of due process and equal protection of the law.

To warrant a finding against the plaintiff and in favor of the defendant by the jury in a civil case

either there must be some positive evidence introduced by the defendant which tends to disprove the facts established by the plaintiff,or the tale as told by the former has to be so outlandish as to astound the belief of reasonable minds. Neither criterion is present in the case Sub Judice.[1]

V

The totality of the conduct herein enumerated and complained about certainly concurred to deprive petitioners of the right to appear and be heard on the issue of their grievances in an orderly forum,and in the final analysis the process deprived them of redress for the wrong committed against them under circumstances which the state insures recovery to white litigants represented by white counsel.

The Constitution of the United States by the Fourteenth Amendment thereto precludes different treatment based on race,sex, and religion,or national origin. The Supreme Court of Ohio ,therefore,committed error when it decided that in claiming that they had been denied due process and equal protection of the law in the case now before the Court,that they had failed to raise substantial constitutional questions.

1 See opinion by Mr. Justice Blackman,speaking for the Court in Chapman v.Meir,420 U.S.at 17,42 L.Ed.2d 766

CONCLUSION

Petitioners therefore pray that a writ will issue out of this Court directed to the Supreme Court of the State of Ohio commanding it to certify the record made and had in the within cause upwards to this Court in order that it might review the same.

George Hopkins III

George Hopkins III

CERTIFICATE OF SERVICE

George Hopkins III does hereby certify that three copies of the Petition for Writ of Certiorari were mailed to Mr. David Schnorf,Attorney at Law, at his office situated at the Spitzer Building,Toledo,Ohio 43604,Toledo,Ohio on the 7 day of August,1978.

George Hopkins III

George Hopkins III

A P P E N D I X

FILED IN THE COURT OF COMMON PLEAS APRIL 27, 1977

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

JANICE DUNCAN, et.al
Plaintiffs-Appellants

VS

BRONDES FORD SALES, INC., et.al
Defendants-Appellees

CAUSE NUMBER 76-0867

NOTICE OF APPEAL

&

PREACIPE FOR TRANSCRIPT

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NOTICE OF APPEAL

Come now the Plaintiffs-Appellants who hereby file their notice of appeal from the verdict of the jury and the judgment entered pursuant thereto, both being entered in the trial court on March 31, 1977.

The appeal herein is taken from the court of common pleas and is prosecuted upwards to the Lucas County Court of Appeals in and for the Sixth Appellate District.

A transcript of the proceedings had in the court below will accompany this appeal.

/s/ George Hopkins III
George Hopkins III

PREACIPE FOR TRANSCRIPT

TO THE CLERK:

Having reference to the proceedings had and decided in the trial court, kindly prepare transcript of the proceedings during the trial hereof, excepting therefrom:

(a) Selection of the jury;

(b) Opening statements of counsel;

(c) Any and all colloquies between court and counsel during recesses in chambers; and,

(d) Closing arguments of counsel.

Kindly prepare, also, all pleadings, docket entries together with exhibits either offered and or entered into evidence during the trial hereof and certify the same upwards to the Court of Appeals of Lucas County, Ohio as required by law.

/s/ George Hopkins III
George Hopkins III

CERTIFICATION OF SERVICE

George Hopkins III does hereby certify that true copies of the within documents were mailed, postage prepaid, to Schnorf, Schnorf, & Schnorf, Attorneys at Law, David M. Schnorf, of Counsel, at 524 Spitzer Building, Toledo, Ohio 43604, on the 26th day of April, 1977.

FILED IN THE COURT OF APPEALS APRIL 27, 1977

ASSIGNMENTS OF ERROR

(1) The trial court erred in allowing defendants' counsel to use depositions for impeachment purpose where the same had not been filed with the court as required by Rule 32(A)(1) of the Ohio Rules of Civil Procedure.

(2) The trial courts' improper and continuous sustaining of objections put by defendant's counsel prejudiced the jury against the plaintiffs through making it appear that their counsel was contemptous of the rules of evidence and of fair play.

(3) Carnival-like atmosphere of trial distracted jury and promoted less serious consideration of magnitude and extent of Janice Duncan's injuries and contributed to denial of both plaintiff's right to recover.

(4) Lying of defendant's medical expert and of police officer who investigated accident prejudiced plaintiffs right to recover.

(5) Trial court erred in excluding plaintiff's medical report and their proferred "exhibit 1" on ground that contents thereof had been testified to while admitting defendant's x-rays whose contents had also been testified to. Trial court thus deprived plaintiffes of right to fair trial and of equal protection of law.

(6) Trial court deprived plaintiffs of equal protection by instructing jury on proximate cause in face of admission of liability by defendants.

(7) Verdict against manifest weight of evidence and contrary to law.

COURT OF APPEALS OF OHIO, SIXTH DISTRICT
COUNTY OF LUCAS

C.A. NO. L-77-099 J.E. 30. 089
MJ 34-037
NO. C176-0867

DECISION
&
JOURNAL ENTRY

FILED COURT OF APPEALS
JAN. 30. 1978
LUCAS COUNTY, OHIO
Carol A. Pietrykowski, Clerk

Janice Duncan, et.al
Appellants

VS

Brondes Ford Sales, Inc., et.al
Appellees

This cause came on to be heard upon the record in the trial court. Each assignment of error was reviewed by the court and upon review the following disposition made:

This is an appeal from a judgment entered in Common Pleas Court, Lucas County, Ohio, pursuant to a jury verdict in favor of defendant on the question of proximate cause.

On August 19, 1974, plaintiff Janice Duncan was a passenger in a car proceeding west on Sylvania Avenue, Toledo, Ohio. The car was struck from

behind by a second vehicle driven by defendant Robert Heeter, an employee and agent of defendant Brondes Ford Sales, Inc.

Toledo police officer who investigated the accident indicated that, in his opinion, vehicle damage was minor and physical injuries were not visible.

Plaintiff was treated by a physicial for neck and back injuries allegedly caused by the accident in question. She was also treated for neck and back injuries allegedly sustained in accidents occurring on February 4, 1974, November 2, 1975 and November 6, 1975.

The accident in question occurred in August, 1974, during a three month lay-off at plaintiff's place of employment. At the culmination of the layoff (October, 1974), plaintiff commenced sick leave. Further layoffs occurred throughout 1974-76, the period for which plaintiff claimed lost wages.

Plaintiff's action for damages included claims for medical expenses and lost wages. A jury found that the accident on August 19, 1974 was not the

proximate cause of plaintiff's injuries. From that judgment, plaintiffs now appeal.

We note at the outset the absence of a formal judgment entry in the clerk's file. The only indication of a final appealable order is the trial judge's signature next to March 31, 1977 entry on the common pleas court docket sheet. A judgment entry form should have been prepared and included in the file.

Plaintiffs present seven assignments of error for consideration by this court; the first is phrased thusly:

> "USE OF DEPOSITIONS FOR IMPEACHMENT PURPOSES IMPERMISSABLE WHERE NOT FILED IN ADVANCE OF TRIAL."

We have searched in vain for "Civ.R.30(a)(1)." However, Civ.R, 32(A) provides, in part:

> (A) Use of depositions. Every deposition intended to be presented as evidence must be filed at least one day before the day of the trial or hearing unless for good cause shown the court permits a later filing.

and, Civ.R. 46 states:

> "An exception at any stage or step of the case or matter is unnecessary to law a foundation for review whenever a matter has been called to the attention of the court by objection, motion, or otherwise and the court has ruled thereon."

Depositions may be used for impeachment purposes even though the depositions are not filed. Plaintiffs failed to object to defendant's use of depositions in the cross-examination of Janice and Browdice Duncan. Having failed to raise any objection at trial, plaintiffs have waived their right to argue the issue on appeal.

Assignment of error No. 1 is not well taken.

The second assignment of error is as follows:

> "AUTOMATIC SUSTAINING OF OBJECTIONS BY TRIAL COURT PREJUDICED APPELLANTS' RIGHT TO RECOVER."

It must be emphasized that the trial court has wide discretion in overseeing the conduct of a trial. When, in the exercise of that discretion, it makes a ruling or takes other action, such action will not be disturbed by this Court unless it plainly appears that there was a abuse of discretion resulting the prejudice to the complaining party.

Having reviewed the record, we find no abuse of discretion; rather, we find an attempt on the part of the trial judge to further justice through orderly procedures.

The trial court did not "repeatedly and arbitrarily" sustain defendant's objections. Assignment of error No. 2 is not well taken.

Assignment of error Nos. 3 and 4 are presented as follows:

> "CALAMITY AT THE COURTHOUSE."
> "PERJURED TESTIMONY FRUSTRATED RIGHT TO FAIR AND IMPARTIAL TRIAL."

We find nothing in the record to sustain plaintiff's allegations of a carnival-like atmosphere and lying by witnesses.

Further, we note that plaintiff's liberal use of such words and phrases as "calamity", "Fiat", "tirades", "hatchet man", "outright lying", "antics", "squirms on the witness stand", "seemy characters", "liar", "ruthlessness", etc. adds little to the substance of his arguments.

Assignments of error Nos. 3 and 4 are not well taken.

Assignment of error No. 5 is presented thusly:

> "EXCLUSION OF PLAINTIFFS' DOCUMENTARY EVIDENCE WHILE ADMITTING DEFENDANTS VIOLATED EQUAL PROTECTION AND DEPRIVED PLAINTIFFS OF FAIR AND IMPARTIAL TRIAL."

The trial court, in the reasonable exercise

of its discretion, may limit the introduction of cumulative evidence when it is satisfied that the issue to which it relates has already been throughly presented. See 52 Ohio Jur. 2d. Trial Sec.65.

The documents sought to be introduced by plaintiffs contained information already testified to at trial. Although it might be argued that admission of those documents would not have prejudiced defendant, we do not believe that their exclusion was prejudiced to plaintiffs.

The lower court did not abuse its discretion in excluding plaintiff's cumulative evidence. Assignment of error No. 5 is not well taken.

Assignment of error No. 6 is presented, to wit:

> "PROXIMATA CAUSE NOT AN ISSUE WHERE LIABILITY IS ADMITTED."

The record presented on appeal establishes that the question of proximate cause was issue. Liability was not admitted.

Trial court properly instructed the jury as to the issue of proximate cause. Assignment of errer No. 6 is not well taken.

Plaintiff's seventh assignment of error is,

to wit:

"VERDICT AGAINST MANIFEST
WEIGHT OF EVIDENCE."

It is well established that a reviewing court will reverse a judgment upon an assignment of error involving the weight of the evidence only when the verdict is so manifestly contrary to the evidence as to produce a result in complete violation of substantial justice. Rathburn vs Humphrey co (1953), 94 Ohio App 429; Springer vs Mittleman, (App, 1954), 117 N.E. 2d. 468; 3 Ohio Jur. 2d., App. Rev., Sec. 819.

The jury verdict herein was not contrary to the manifest weight of the evidence presented. Assignment of error No. 7 is not well taken.

On consideration whereof, this court finds that substantial justice has been done the parties complaining. Judgment of the Lucas County Common Pleas Court is affirmed.

This cause is remanded to said court for execution of judgment and for costs. Costs assessed against plaintiffs-appellants.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules

of the Appellate procedure.

Ten (10) days from the date hereof this document shall constitute the journal entry of judgment and shall be filed stamped by the Clerk of the Court of Appeals, at which time the period for review will begin to run. App. R. 22(E).

John W. Potter,P.J. /s/ John W. Potter
Presiding Judge

John J. Connors,Jr.,J. /s/ John J. Connors, Jr.
Judge

Clifford F. Brown, J., dissents.

BROWN, J., dissents. The evidence is undisputed, including medical evidence based upon reasonable medical certainty from plaintiff's treating physician, that plaintiff sustained some injury directly and proximately from the collision with defendant's vehicle on August 19. 1974, and further the operation by defendant of his vehicle so as to strike the rear end of the automobile in which plaintiff was a passenger makes defendant under such circumstances liable as a matter of law for the injuries directly and proximately caused plaintiff. Since defendant was negligent as a matter

of law for the injuries directly and proximately caused plaintiff. Since defendant was negligent as a matter of law in causing the collision, and that the evidence is undisputed that the collision directly and proximately caused some injury to plaintiff, the jury verdict for defendant is contrary to the manifest weight of the evidence. Therefore, the seventh assignment of error is well taken and the judgment on the jury verdict for that reason should be reversed and a new trial ordered.

I concur in the finding of the majority that the first six assignments of error are not well taken.

FILED IN THE COURT OF APPEALS FEBRUARY 28, 1978

IN THE COURT OF APPEALS OF LUCAS COUNTY, OHIO
SIXTH APPELLATE DISTRICT

Janice Duncan, et.al
Appellants

VS

Brondes Ford Sales, Inc., et.al
Appellants

C. A. Number 77-099

NOTICE OF APPEAL

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Come now the Appellants who hereby file their notice of appeal from the decision of the Sixth District Court of Appeals; the same having been entered of record on January 30, 1978.

By that judgment the Court of Appeals decided that the seven assignments of error advanced by the Appellants were not "well taken", and affirmed the judgment of the trial court as rendered by the verdict of the jury, on of the judges dissenting

from the finding of the majority respecting Appellants' seventh assignment of error, namely, that the"verdict was against the manifest weight of the evidence" and contrary to law.

The appeal herein does involve substantial constitutional questions respecting due process and equal protection of the law as they concern themselves with the right to counsel of ones own choosing in a civil case; states failure to conduct its court proceedings in an orderly fashion and the impact thereof upon due process of law, and the arbitrary and unequal application of the laws of a state by its judicial system to citizens similarly situated.

The text of the decision of the Court of Appeals will be set out in the appendix to Appellants brief.

/s/ George Hopkins III
George Hopkins III

CERTIFICATE OF SERVICE

George Hopkins III does hereby certify that a true copy of the within notice of appeal was

mailed to David M. Schnorf, Esquire, Spitzer Building, Toledo, Ohio on the 23rd day of February, 1978.

/s/ George Hopkins III
George Hopkins III

FILED IN THE SUPREME COURT OF OHIO MARCH 27, 1978

PROPOSITIONS OF LAW

PROPOSITION OF LAW NUMBER ONE

Right to fair and impartial trial demands that decision-maker be free from actual bias as well as "appearance of bias;" that trial be had in an orderly atmosphere, and that substantive and procedural rules be applied and obeyed. Withrow vs Larkin, 421 U.S.35, 43 L.Ed 2d. 712; Gibson vs Berryhill, 411 U.S. 546, 36 L.Ed. 2d 488; In re: Murchison, 349 U.S.133,99 L.Ed. 942; Peckham vs United States, 210 F2d. 693; Offutt vs United States, 348 U.S. 11,99 L.Ed. 17; Mayberry vs Pennsylvania, 400 U.S. 455,27 L.Ed. 2d 532; Groppi vs Leslie, 404 U.S. 496,30 L.Ed. 2d 632; Civil Rule 30(A), Ohio Rules of Civil Procedure.

PROPOSITION OF LAW NUMBER TWO

State may not propagate its policy of applying economic sanctions against black lawyers and litigants in its courts through depriving white litigants of the right to counsel of their own choosing in a civil case. United States Constitution, Amendment XIV; Art. 1, Section 10, Ohio Constitution; Buchanan vs Warley, 245 U.S. 60; Harman vs Tyler, 273 U.S. 668; Betts vs Brady, 316 U.S. 455; Railway Mail vs Corsi, 326 U.S. 88; NAACP vs Alabama, 357 U.S. 663; NAACP vs Button, 371 U.S.415.

PROPOSITION OF LAW NUMBER THREE

Where the verdict is unsupported by evidence, the injured party is deprived of due process and equal protection of the law.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, 1978 TERM

City of Columbus. To wit: May 11, 1978

Janice Duncan, et al.,
Appellants,

vs.

Brondes Ford Sales, Inc., et al.,
Appellees.

No. 78-390

MOTION FOR AN ORDER DIRECTING
THE COURT OF APPEALS

for LUCAS County

TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by George Hopkins, III.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and seal of the Court this ____ day of _____, 19___

_____, Clerk

_____, Deputy

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, 1978 TERM

City of Columbus. To wit: May 11, 1978

Janice Duncan, et al.,
Appellants,

vs.

Brondes Ford Sales, Inc., et al.,
Appellees.

No. 78-390

APPEAL FROM THE
COURT OF APPEALS

for LUCAS County

This cause, here on appeal as of right from the Court of Appeals for Lucas County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Lucas County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and seal of the Court this ____ day of _____, 19____

_____, Clerk

_____, Deputy

XX

IN THE SUPREME COURT OF THE STATE OF OHIO

JANICE DUNCAN, et.al.,
Appellants

VS CAUSE NUMBER 78-390

NOTICE OF APPEAL

BRONDES FORD SALES,INC.,et.al.,
Appellees

George Hopkins III
Hopkins Office Building
1202 Junction Avenue
Toledo,Ohio 43607

ATTORNEY FOR APPELLANTS

DAVID SCHNORF
Spitzer Building
Toledo,Ohio 43604

ATTORNEY FOR APPELLEES

XX(a)

Come now the Appellants who hereby file their notice of appeal from the judgment entered by this Court in their cause by this Court;the same having been entered on May 11,1978.

The said appeal is prosecuted to the United States Supreme Court and is by way of Petition for Writ of Certiorari to this Court.

/s/ George Hopkins III
George Hopkins III

CERTIFICATE OF SERVICE

George Hopkins III does hereby certify that a copy hereof was mailed to David Schnorf,Attorney at Law,at his office situated in the Spitzer Building, Toledo,Ohio 43604,on the 29th. day of July,1978.

/s/ George Hopkins III
George Hopkins III

Q Doctor, predicated upon your experience with these types of cases, as well as your treatment, your relationship with Mrs, Duncan, tell us what is the nature of those injuries, permanent or temporary?

MR. SCHNORF: Objection.

THE COURT: May I see counsel?

(Discussion held at the bench.)

THE COURT: Go ahead Mr. Hopkins.

MR. HOPKINS: Thank you so much, Your Honor.

Q Again doctor, as a medical man, with your knowledge of Mrs. Duncan's condition afforded you by your treatment and rendition of services to her, do you have an opinion relative to the nature and the extent of the injuries which she sustained and to which you treated her?

MR. SCHNORF: Objection.

THE COURT: Do you have an opinion based on reasonable medical certainty?

Q Let's put it in the words, reasonable medical certainty, doctor.

A Yes, I do.

Q Will you give us that opinion, please? Tell the Jury what that opinion is.

A It is my opinion that this patient sustained an acute cervical strain and moderate lumbosacral strain, contusions to the chest wall due to an auto injury which was sustained on August 19, 1974. As a result of an auto collision.

Q What conclusions do you reach relative to the temporary nature or permanent nature thereof?

MR. SCHNORF: Note my objection.

A My opinion, as far as prognosis or outlook, as far as a patient, I would have to say she has a condition which is what we call an unstable neck which by definition can be at times free from pain, but other times become symptomatic, depending on what kind of activity. Also calling it unstable because it leaves then prone to reoccurrences of the symptoms, spontaneous or within any strenuous work at any time.

With regard to these chest injuries, that recovered in three to four weeks. The result to look back on the problem, that seems to be a minor reoccurrence.

Q I show you this, doctor, and ask you if you can identify it.

A That is a letter. Yes, I can identify it.

MR. SCHNORF: May we approach the Bench?

(Discussion held at the Bench.)

MR. HOPKINS: Now, that is a medical report prepared by Dr. Kasher and submitted to me, dealing with his diagnosis as well as his prognosis of Mrs. Duncan in relationship to his treatment of her.

THE COURT: He has already testified to that.

MR. SCHNORF: Defendant objects.

THE COURT: I will sustain the objection.

Q When was the last time that you had occasion to examine Mrs. Duncan, doctor, for the August accident, 1974?

A August 11, 1975.

Q And were her conditions at that time substantially the same as you have described them to the Jury?

A Yes, they were.

MR. HOPKINS: No further questions.

THE COURT: Mr. Schnorf?

CROSS EXAMINATION

BY MR. HOPKINS:

Q Dr. Skopek, I think you testified in your field, in your profession, orthopedics concerns itself primarily with bones and bone structures, et cetera, is that right, sir?

A Yes, that is true.

Q Now, consequently, when Mrs. Janice Duncan reported to your office on or about 2-25-76, you were concerned primarily with trying to determine whether or not there were no bone fractures or anything of that nature?

A No, that is not necessarily true.

Q What were you concerned with primarily?

A Concerned with what residual disabilities she may have from the accidents that were in question here.

Q To what part of her body, sir?

A To the neck, the shoulders, the mid spine, lower spine, upper and lower extremities which just

about includes everything.

Q Now, Dr. Skopek, when Mrs. Duncan appeared in your office on or about 2-25-76, you said she never made any report to you relative to a 1971 automobile accident and her being involved therein, is that true?

A That's true.

Q Did you ask her if she had been involved in an automobile accident in 1971?

A Why should I ask her if she was involved in any accidents? I couldn't go through 1970, '71, '72, it is rather silly.

Q Did you specify some years, doctor?

A I asked her if she had any previous accidents. I didn't specify the years. I expected her to tell me the years.

Q All the way back to the time she was a child?

A That's true, yes.

Q All right, that is, we want to know what you had in mind.

Now, relative to any feelings, bad feelings that is, which she might have or might not have had at the scene of the accident, you didn't inquire as

to how she felt immediately after the accident either, did you?

A She stated she didn't feel any discomfort until the following day.

Q But you didn't ask her, how did you feel on the day of the accident, did you?

A No, usually a history---

Q Just tell us what you did, doctor.

A No I did not because that is not included in the history.

Q Now, Dr. Skopek, you testified -- you are testifying relative to major impacts and minor impacts.

A That's true.

Q Your testimony was that if the impact to the rear of an automobile was minor, then the likelihood of it inflicting permanent injuries upon one of the passengers was slight, isn't that right.

A That has been my experience in the practice of orthopedics for thirty years.

Q You also testified that if the impact was major, then the chances of permanent injury were greater, isn't that correct?

A Not necessarily.

Q Then are you testifying there is no difference,

it dosen't matter?

A You said permanent injury.

Q Is there some relationship, doctor, between the extent or the severity of the impact and the magnitude of the injuries sustained as a result thereof?

A Yes, there is.

Q Now, tell us what is that relationship?

A The relationship is in minor injury, you wouldn't in a minor accident -- you wouldn't expect much injury, but in a more drastic accident where the impact was greater, you would expect, not always, but you would expect some increase symptomology.

Q Now, then, an automobile sliding 85 feet and hitting an automobile and knocking it the distance from the witness chair where you are seated to this table, is that major impact or minor impact in accordance with your definition as a doctor?

MR. SCHNORF: I would like to get into how much damage there was to the car.

MR. HOPKINS: This is cross examination.

MR. SCHNORF: If the witness can

answer that question without knowing the extent of the damage of the automobile, or the automobile involved, fine, I don't want to because we are talking about the impact now and not the slide. We are not talking about anything but the force of the impact of the car. There is evidence by the damage of the car.

Q Will you answer the question, please, if you understood it. How would you describe that impact as severe or minor?

A I think you would have to tell me about the impact, about the damage that was inflicted. An individual can skid for a block, but by the time he strikes the car, he probably wasn't going very fast.

Q Do you want to change your hypothesis then? Do you want to say that impact plus damage to the automobile plus distance traveled equals a major or minor impact?

A Not distance traveled, no.

Q What do you want to say, sir?

A I would base my injury status on the impact to damage that was done.

Q Done to what?

A Impact on the car can be light, it does little damage and it can be heavy and it can do heavy damage, and that is what I base my theory on.

Q Are you testifying that there is some relationship to the degree of injury sustained by one of the passengers in the automobile and the amount of damage to the automobile, are you testifying that there is some relationship there?

A I would say there is, yes.

Q Is there a necessary relationship?

A What do you mean by necessary?

Q In other words, without one there couldn't be the other.

A Oh, there could be.

Q Oh, then, the damages to the automobile or the instrument struck could be minor yet the damages to the passenger great, isn't that right?

A It is a possibility, but not a probability.

Q Now, you testified that during the course of your examination of Mrs. Duncan while she was in your office on 2-25-76, you found no restriction in movement insofar as her ability to touch her toes was concerned, is that right?

A She lacked approximately three inches which in my case was within normal limits because she stated she never could.

Q Well, now --

A Do you want me to go on?

Q You have answered the question. I will get back to anything else I need.

Now, then, doctor, if in the ability to come closer to touching ones toes with ones fingers, three inches, why did you find it necessary to inquire as to why she couldn't do any better?

A Because I wanted to know whether she could or not.

Q Then isn't it normal for one not to be able to touch his toes?

A It isn't normal --

Q I'm asking you.

A I'm asking you, did you ask me is it normal?

Q I said then it isn't normal.

A It may be normal for an individual -- I never could bend down and touch my toes, I always lack about four inches.

THE COURT: I don't think I could make it within eight inches.

Q What does that have to do with this case?

A The normal varies with individuals. She stated following that she never could do the touching of the toes.

Q We are not saying you are the same size as Mrs. Duncan.

A No

Q Or you are not the same age.

A That's true.

Q Isn't ther a relationship between dexterity and the age of the individual involved?

A I will agree with you there.

Q Your inability to touch the toes or jump over a stick has nothing to do with Mrs. Duncan, isn't that right?

A That is true.

Q Now, you said that on examining Mrs. Duncan she did complain about soreness in the lower region of the back, did you not, sir?

A Yes, I did.

Q Now, did you determine whether or not or the complaint to that respect was bonafide? In other words, was it true or was she pretending about the soreness?

A It was subjective complaints, and inasmuch as I did not find any objective finding to substantiate the subjective complaints, I didn't think is was very important.

Q All right. So you don't know whether she was experiencing soreness in the lower region of her back at the time when you examined her on 2-25-76, do you not?

A I find no objective findings.

Q But you don't know it to be false?

MR. SCHNORF: Mr. Hopkins, let the doctor answer.

Q Proceed, doctor.

A What was it? Repeat the question.

Q We will pas that one, I think, unless you have some objection.

Now, doctor, as you went about giving us a dissertation on the x-rays which you took and what they revealed, et cetera, et cetera, on the machine, you talked about and concerned yourself with subjects of spinal curvature, didyou not?

A In the lateral view I did, yes.

Q And the reason why you paid as much attention

to spinal curvature as you did was because you wanted to determine whether or not there were muscular spasms, isn't that so?

A That was one of the reasons, yes.

Q Was there another reason?

A Yes.

Q Tell us what it was?

A We take the lateral, the side view, to see whether the disc spaces are normal, whether the vertebrae are normally in line, whether the individual might have a tumor, she might have arthritis, there are many reasons why we take x-rays.

Q But you found no curvature of the spine on 2-25-76, did you?

A Normal curvature.

Q And from that, you discussed that there were no muscle spasms at the time, is that right?

A From that, and also from my examination and clinical evaluation.

Q All right, sir. Now, did you also conclude, doctor, from the conditions of the spinal chord, at that time, that there had never been any muscle spasm as a result of the curvature of the spine?

A Was it my conclusion that there was never any spasm?

Q Yes, sir.

A No, I can't say that there was never any muscle spasm.

Q So consequently, from August 20 or 19, 1974, down to February 25, 1976, it is almost two years, isn't that right?

A That's true.

Q So it is medically possible, isn't that so, that Mrs. Duncan could have had various degrees of curvature of the spinal chord producing muscular spasm from that period to just before she came in to see you, and she could have cleared up by that time, isn't that so?

A She could have.

Q And you would not have known any differently?

A From the treatment she received, I would say there was not much pathology in this case.

Q All right. Now, doctor, let's assume, that Mrs. Duncan was witnessing muscular spasms, that sometime subsequent to the accident and terminating just before she came in to your office for an examination, the lower part of her back still would be

very sore from those muscular spasms, isn't that so?

A What accident are you referring to?

Q I'm referring to August 19, 1974 accident.

A That would be rather difficult to state.

Q But you can't say it isn't true?

A As to what caused it.

Q It is also difficult to refute, isn't that right?

A Refute what?

Q That the August 19 accident caused it or didn't, or vice versa, the other accident?

A If there were muscle spasms, it would be rather difficult, yes.

Q Really and truly, doctor, the only thing that your examination revealed by way of information to you, if anything, in fact, the best evidence that you could possibly gleaned from that examination on 2-25-76, was whether or not Mrs. Duncan had sustained any visible permanent injuries to the back, to the spinal chord and to the neck, isn't that right?

A If the injuries were permanent as you state, I would expect to find some objective findings to substantiate it.

Q But you didn't find any, isn't that so?

A Absolutely not.

Q Also, Dr. Skopek, isn't it a fact, that there could have been permanent injuries to the back which you did not detect on your radar screen or x-ray screen isn't there, sir?

A That may be possible, but not probable.

Q So, Dr. Skopek, you are a medical man, a professional man, and you are merely testifying to what instruments which you used revealed in accordance with your experience, isn't that true?

A These instruments that have been used for years.

Q The facts still remain, is that you are basing your testimony strictly on those instruments, isn't that right, sir?

A Every doctor does that.

Q Let's not talk about every doctor, let's stick with you.

A I do that, yes.

Q Now, Dr. Skopek, under no circumstances can you honestly determine the extent, the degree and the magnitude of the injuries sustained by Mrs. Duncan in 1974 at the time of your examination in 1976,

can you?

A I think I can. I have been doing it for years.

Q What does that have to do with Mrs. Duncan?

A It has to do with all people that I have treated.

Q Do you want this Jury to believe that over the period of years that you have always been correct?

A No, I'm like an attorney, I'm wrong sometimes.

Q Let's leave the attorneys out of it, will you please?

I don't believe I have any further questions.

MR HOPKINS: (Questioning Mrs. Duncan)

Q All right six. All right. Now, are you less of a mother to that child now than what you were before the accident?

A Yes, I am.

Q Tell us how?

A Well, I don't have the patience with him that I did, and I get very upset very easily.

Q Are you testifying that you are not as emotionally stable now as you were before the accident?

MR. SCHNORF: I'm trying to give Mr. Hopkins latitude, but he is running all

over me.

THE COURT: Sustained.

Q Does Mr. Duncan appear to be happy about your less faithfulness, nonchalant -- is he concerned or does he give the appearance to be concerned?

MR. SCHNORF: Objection.

THE COURT: Sustained

Q It is your testimony that you don't have any particular skills now?

A No, I don't.

Q So you can't command a job at Devilbiss other than what was at the time of your sick leave?

A Yes.

MR. SCHNORF: Objection.

Mr. Hopkins is experienced counsel, and he knows how to ask a question.

THE COURT: Sustained. The Jury will be ordered to disregard the question.

Q Do you have any idea about what your hourly income was while you were working as a security guard?

A I think it was two and a half.

Q Mrs. Duncan, now, has the overall standard of

living of your family been effected by your unemployment?

A Yes, it has.

Q Can you tell us whether it has been upward or downward?

MR. SCHNORF: Objection. It is not an element of damage.

THE COURT: Sustained.

MR. HOPKINS: (Questioning Dr. Skopek)

Q Was Mrs. Duncan's injury accompanied by muscle spasms?

A Yes it was.

Q Now, doctor, did you prescribe x-rays for Mrs. Duncan, if you recall?

A Yes, x-rays were done immediately following her first visit on August 20, 1974. I would presume that afternoon.

Q What do they show, if anything?

A X-rays of the cervical spine and a low back sping. There was no acute bony anomaly in the area.

Q Now, in terms of cervical strain and the injury to the neck, et cetera, from your findings, were these injuries severe or were they slight, or were

they moderate, or how were they?

MR. SCHNORF: Objection. It is an improper question, the doctor is well qualified to testify without Mr. Hopkins leading him through.

RULE 32 USE OF DEPOSITIONS IN COURT PROCEEDINGS

(A) Use of Depositions

Every deposition intended to be presented as evidence must be filed at least one day before the day of trial or hearing unless for good cause shown the court permits a later filing.

UNITIED STATES CONSTITUTION

AMENDMENT XIV, SECTION 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny, to any person within its jurisdiction the equal protection of the laws."

SPEED LIMITS

4511.21 Speed limits; modifications

No person shall operate a motor vehicle, trackless trolley, or streetcar at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface, and width of the street or highway and any other conditions, and no person shall drive any motor vehicle, trackless trolley, or streetcar in and upon any street or highway at a greater speed than will permit him to bring it to a stop within the assured clear distance ahead.

It is prima-facie lawful, in the absence of a lower limit declared pursuant to this section by the director of transportation or local authorities, for the operator of a vehicle, trackless trolley, or streetcar to operate the same at a speed not exceeding the following:

(A) Twenty miles per hour when passing a school building or the grounds thereof during school recess and while children are going to or leaving school during the opening or closing hours, and when appropriate signs giving notice of the existence of the school are erected; except, that on controlled-access highways and expressways, if the right-of-way line fence has been erected without pedestrian opening, the speed shall be governed by division (D) of this section and on freeways, if the right-of-way line fence has been erected without pedestrian opening, the speed shall be governed by divisions (H) and (I) of this section;

(B) Twenty-five miles per hour in all other portions of a municipal corporation, except on state routes, through highways, outside business districts, and alleys;

(C) Thirty-five miles per hour in all state routes or through highways within municipal corporations outside business districts, except as provided in divisions (D) and (F) of this section;

(D) Fifty miles per hour on controlled-access highways and expressways within municipal corporations;

(E) Fifty-five miles per hour during the daytime and fifty miles per hour during the nighttime

on highways outside of municipal corporations except fifty miles per hour at all times for operators of trucks and commercial tractors weighing in excess of four thousand pounds empty weight, school buses, streetcars, and trackless trolleys;

As used in this section "nighttime" means any time when lighted lights are required by section 4513.03 of the Revised Code. "Daytime" means any other time.

(F) Fifty miles per hour on state routes within municipal corporations outside urban districts unless a lower prima-facie speed is established as further provided in this section;

(G) Fifteen miles per hour on all alleys within the municipal corporation;

(H) Fifty-five miles per hour at all times on freeways with paved shoulders inside municipal corporations except fifty miles per hour at all times for operators of trucks and commercial tractors weighing in excess of four thousand pounds empty weight and school buses;

(I) Fifty-five miles per hour at all times on freeways outside municipal corporations.

(J) It is prima-facie unlawful for any person to exceed any of the speed limitations in divisions (A), (B), (C), (D), (F), and (G) of this section, or any declared pursuant to this section by the director or local authorities and it is unlawful for any person to exceed the speed limitation in division (K) of this section. No person shall be convicted of more than one violation of this section for the same conduct, although violations of more than one provision of this section may be charged in the alternative in a single affidavit.

(K) No person shall operate a motor vehicle, trackless trolley, or streetcar upon the streets or highways at a speed exceeding fifty-five miles per hour.

(L) In every charge of violation of this section the affidavit and warrant shall specify the time, place, and speed at which the defendant is alleged to have driven, and in charges made in reliance upon division (J) of this section also the speed which division (A), (B), (C), (D), (F), or (G) of, or a limit declared pursuant to, this

section declares is prima-facie lawful at the time and place of such alleged violation, except that in affidavits where a person is alleged to have driven at a greater speed than will permit him to bring the vehicle to a stop within the assured clear distance ahead the affidavit and warrant need not specify the speed at which the defendant is alleged to have driven.

(M) When a speed in excess of both a prima-facie limitation and the limitation in division (K), of this section is alleged, the defendant shall be charged in a single affidavit, alleging a single act, with a violation indicated of both division (A), (B), (C), (D), (F), or (G), or of a limit declared pursuant to this section by the director or local authorities, and of division (K), of this section. If the court finds a violation of division (A), (B), (C), (D), (F), or (G) of, or a limit declared pursuant to this section has occurred, it shall enter a judgment of conviction under such division and dismiss the charge under division (K) of this section. If it finds no violation of division (A), (B), (C), (D), (F), or (G) of, or a limit declared pursuant to this section, it shall then consider whether the evidence supports a conviction under division (K) of this section.

(N) Points shall be assessed for violation of division (K) of this section only when the court finds the violation involved a speed in excess of:

(1) Sixty* miles per hour on highways as provided in divisions (E) and (H) of this section;

(2) Seventy* miles per hour on highways as provided in division (I) of this section.

Convictions for violation of division (K) of this section, or any ordinance enacted to reduce speeds in compliance with division (K), shall not be forwarded to the bureau of motor vehicles as provided under section 4507.40 of the Revised Code unless points are assessed as provided in this division.

Whenever the director of transportation determines upon the basis of an engineering and traffic investigation that any speed limit set forth in divisions (A) to (K) of this section is

greater than is reasonable or safe under the conditions found to exist at any intersection or other place upon any part of a state route, the director shall determine and declare a reasonable and safe prima-facie speed limit, which shall be effective when appropriate signs giving notice are erected at the intersection or other part of the state route.

Whenever local authorities determine upon the basis of an engineering and traffic investigation that the speed permitted by divisions (A) to (K) of this section, on any part of a highway under their jurisdiction is greater than is reasonable and safe under the conditions found to exist at such location, the local authorities may by resolution request the director to determine and declare a reasonable and safe prima-facie speed limit. Upon receipt of such request the director may determine and declare a reasonable and safe prima-facie speed limit at such location, and if the director does so then such declared speed limit shall become effective only when appropriate signs giving notice thereof are erected at such location by the local authorities. The director may withdraw his declaration of any prima-facie speed limit whenever in his opinion any altered prima-facie speed becomes unreasonable, and upon such withdrawal the declared prima-facie speed shall become ineffective, and the signs relating thereto shall be immediately removed by the local authorities.

Local authorities in the respective jurisdictions may authorize by ordinance higher prima-facie speeds than those stated in this section upon through highways or upon highways or portions thereof where there are no intersections, or between widely spaced intersections, provided signs are erected giving notice of the authorized speed, but local authorities shall not modify or alter the basic rule set forth in the first paragraph of this section or in any event authorize by ordinance a speed in excess of fifty miles per hour.

Alteration of prima-facie limits on state routes by local authorities shall not be effective until the alteration has been approved by the director. The director may withdraw his approval of any

altered prima-facie speed limits whenever in his opinion any altered prima-facie speed becomes unreasonable, and upon such withdrawal the altered prima-facie speed shall become ineffective, and the signs relating thereto shall be immediately removed by the local authorities.

* Speed limits are now fifty-five miles per hour.

CROSS REFERENCES

15 OS(2d) 1, 238 NE(2d) 539 (1968), Transportation Corp v Lenox Trucking. The violation of 4511.21 is negligence per se, and the defense of unavoidable accident due to a sudden emergency is not ordinarily available to a defendant who violates that statute.

2 OS(2d) 1, 205 NE(2d) 890 (1965), Spalding v Waxler. Any unexcused failure to comply with the assured-clear-distance-ahead provision of 4511.21 constitutes negligence per se.

176 OS 337, 199 NE(2d) 559 (1964), Ventress v Frambes. The operator of a motor vehicle must take into consideration the condition of the surface of the street as well as other surrounding circumstances in regulating his speed, and must keep his vehicle under such control in light of those conditions as to be able to stop within the assured clear distance ahead.

47 Abs 136, 67 NE(2d) 98. Kohnle v Carey. Where two cars are traveling in same direction, one to rear and little to right of other, the operator of first car in line signals for left turn but proceeds to make right turn and rear car collides with side of first car, driver of rear car is not excused from operation of assured clear distance rule by reason of sudden entrance into his path of obstruction, as first car was always in path of travel and never having left it could not be said to have suddenly entered and obstructed it.

Supreme Court, U. S.
FILED
SEP 6 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

JANICE DUNCAN,
et al.,

Petitioners

Supreme Court No. 78-214

vs.

BRONDES FORD
SALES, INC.,
et al.,

Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

JURSIDICTIONAL BASIS. 1-2
STATEMENT OF THE CASE 2-4
ARGUMENT. 4-9
CONCLUSION. 9-10
CERTIFICATE OF SERVICE. 11

TABLE OF CASES

Al McCullough Transfer Co. v. Pizzulo, 53 Ohio App. 470. 7

Fox Film Corp. v. Muller, 296 U.S. 207 (1935). 8

Hoover v. State, 91 Ohio St. 41 . . 7

Lynch v. New York ex rel Pierson, 293 U.S. 52 54-55 (1935) 9

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1954) . . . 10

Woods v. Nierstheimer Warden, 328 U.S. 211 (1946). 9

STATUTES

9 West's Ohio Practice, Rules of Civil Procedure Annotated Civil Rules 32 7

Rule 19 1 (a) of the Rules of the Supreme Court of the United States 9

MISCELLANEOUS

58 Am Jur. Witnesses, Sec. 767. . . 7
62 Colum L. Rev. 822 (1962) 8
Stern and Gressman, Supreme Court Practice, The Bureau of National Affairs, Inc., Washington, D.C. 1969, page 134 8-9

Now come the respondents and respectfully move this Court for an Order denying petitioners' Petition for Writ of Certiorari.

JURISDICTIONAL BASIS

The petitioners have based their claim for jurisdiction in this Court upon 28 U.S.C. Section 1257 (3), which reads in pertinent part:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3). . .or where any title, right, privilege or immunity is specially set up or claimed under the Constitution. . ."

We would agree with the petitioners that this section is properly invoked as to jurisdiction for this Court to consider a Petition for Writ of Certiorari in as much as it covers the entire range of federal questions which can arise in a state court action.

When, however, there are adequate state grounds upon which the state court based its decision then this Court should not exercise its jurisdiction. Respondents would submit that there are adequate and independent non-federal grounds in the case Sub Judice and therefore it is not a proper case for review in the Supreme Court.

STATEMENT OF THE CASE

This case involves a trial which was commenced in the Common Pleas Court of Lucas County, Ohio on March 30, 1977 and was terminated on March 31, 1977, involving a personal injury claim. After all parties rested upon their cases and upon due deliberation, the jury returned a verdict for the defendants on the issue that there was a failure of the plaintiffs to prove the requisite nexus between any negligence on the part of the defendants and the alleged injuries sustained by the plaintiffs

which may have been as a proximate result of such negligence.

The plaintiff-petitioners, herein, prosecuted an appeal to the Court of Appeals of Lucas County, Ohio, the Sixth District Court of Appeals, alleging seven assignments of error, only two of which addressed purported constitutional issues:

> "(5) Trial Court erred in excluding plaintiff's medical report . . .thus deprived plaintiffs of a right to fair trial and of equal protection of law, and
>
> (6) Trial Court deprived plaintiffs of equal protection by instructing jury on proximate cause in fact of admission."
> (See petitioners' Appendix V)

The Court of Appeals affirmed the trial court, with one judge dissenting in part but not upon the assignments set forth above.

Appeal was then taken by plaintiff-petitioners to the Ohio Supreme Court upon three propositions of law, as set out in

petitioners' Petition for Writ of Certiorari, at Appendix XVIII. The Supreme Court of Ohio, on May 11, 1978 dismissed the appeal for the reason that no substantial constitutional question existed therein, thus allowing to stand the jury verdict for the defendants.

ARGUMENT

I. The petitioners have come to this Court with five questions for consideration. Each purports to contain within it questions of federal dimension. If this Court were to accept this premise then it would find itself as the trier of fact in the case, requiring an in depth review of the trial court record.

Petitioners argue that whites represented by non-white counsel are denied due process of law, equal protection and do not receive fair and impartial trials. They have set forth cases with citations to the Toledo,Ohio Municipal Court and the Lucas County

Court of Common Pleas, among others, where white litigants represented by non-white counsel have not prevailed in the Ohio Courts. We will not take up the Court's time by providing citations of cases where white litigants represented by white attorneys or black litigants represented by black lawyers or black litigants represented by white lawyers have not prevailed in Ohio's judicial system, because as the system presently exists there is generally only one prevailing party.

Addressing the issue of the fairness of the trial, we would ask the Court to review the Sixth Circuit Court of Appeals' response to petitioners' then designated assignment of error number three, presented as "Calamity at the Courthouse" and assignment of error number four, "Perjured Testimony Frustrated Right to Fair and Impartial Trial", where the Court stated:

> "We find nothing in the record to sustain plaintiffs' allegations of a 'carnival-like atmosphere' and 'lying' by witnesses.
>
> Further we note that plaintiffs' liberal use of such words and phrases as 'calamity', 'fiat', 'tirades', 'hatchet man', 'outright lying', 'antics', squirms on the witness stand', 'seemy characters', 'liar', 'ruthlessness', etc. adds little to the substance to his arguments." (Petitioners' Appendix X)

Contrary to what the plaintiff-petitioners would have the Court believe, the trial below was at all times conducted in an orderly fashion with the trial judge ruling on all objections in conformity to the guidelines set forth in Ohio's statutes and rules governing courtroom procedures as to admissibility of evidence and courtroom decorum and procedure.

As it pertains to the petitioners' discussion of Ohio Rule of Civil Procedure 32 (A), we would respectfully ask the Court

to review subsection (A)(1) of Rule 32, and the annotations following it in 9 West's Ohio Practice, Rules of Civil Procedure Annotated, Civil Rule 32 (1970)

> "(A)(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as witness."

See also Hoover v. State, 91 Ohio State 41, Al McCullough Transfer Co. v. Pizzulo, 53 Ohio App. 470, and 58 Am. Jur. Witnesses Section 767. Subsection (A) of Rule 32 only requires the filing of depositions with the court when the deposition is to be "read in evidence". In any case such a contention is in no way one of federal dimensions.

II. All of the foregoing discussion is presented only for clarification of the issues. We submit that there are adequate state grounds such as the Ohio Rules of Civil Procedure, which are wholly independent of any claimed federal question or ground

and which support the decision of the Ohio Supreme Court in its dismissal of petitioners' appeal as being without substantial federal question. See generally 62 Colum L. Rev. 822 (1962); Fox Film Corp. v. Muller, 296 U.S. 207 (1935).

Even in cases where both federal and non-federal questions are properly raised in the record, without admitting that to be the case here, but no opinion is delivered by the highest state court in rendering its judgment, we would argue that it has been the overall practice of this Court to presume that the decision of the state court was based upon a non-federal ground raised in the record which may be found adequate to grant it. Stern and Gressman, Supreme Court Practice, The Bureau of National Affairs, Inc., Washington, D.C. 1969, page 134.

Stern and Gressman also write that:

> "This presumption grows out of the principal that there must be some affirmative showing in the record that a federal question was presented to the state court and that a decision on such question was necessary to a determination of the cause. Where this is not clearly indicated, especially because of the presence of an adequate non-federal ground, jurisdiction will be declined." Id, at 134-135

See also Lynch v. New York ex rel Pierson, 293 U.S. 52, 54-55 (1934); and Woods v. Nierstheimer Warden, 328 U.S. 211 (1946).

CONCLUSION

Rule 19 1 (a) of the Rules of the Supreme Court of the United States is the codification of the discretionary boundaries which the Supreme Court will utilize in determining whether a case is one which should be heard on a Petition for Writ of Certiorari.

Rule 19 1 (a) reads:

> "1. A review on a writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefore. The following, while neither controlling nor

fully measuring the Court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court or has decided it in a way probably not in accord with applicable decisions of this court."

We submit that the questions presented by the petitioners are not "special" in the sense that they relate to problems beyond the acedemic or episodic and do no reach constitutional dimensions. Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1954). Further, we submit, that the Ohio Supreme Court has not decided a federal question of substance not previously determined by this court, or not in accord with applicable decisions of this Court.

On this basis we respectfully request that the Court deny petitioners' Petition for Writ of Certiorari.

Respectfully submitted:

David M. Schnorf

CERTIFICATE OF SERVICE

I hereby certify that copies of the Brief in Opposition to Petition for Writ of Certiorari were mailed by ordinary U.S. mail to George Hopkins, III, Attorney at Law, 1202 Junction Avenue, Toledo, Ohio 43607 and to R. Jesse Brown, Suite 107 Capital Towers, Jackson, Mississippi 39150.

David M. Schnorf